

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 138 OF 2018

*(Originating from Resident Magistrate Court of Dar es Salaam at Kisutu Criminal Case No 174 of 2014
dated 12th December, 2017)*

**1. DONALD JOSEPH NZWEKA
2. KULWA ADAXISON MWAKAGENDA.....APPELLANTS
3. ALLY HASHIMU@AKILI
4. MICHAEL PASCHAL MAHENYA**
VERSUS
REPUBLICRESPONDENT

JUDGMENT

Date of Last Order: 12/09/2019

Date of Judgment: 03/10/2019

MLYAMBINA, J.

The appellants were convicted by the Resident Magistrate Court of Dar es Salaam at Kisutu for *Armed Robbery contrary to Section 287 A of the Penal Code Cap 16 (RE. 2002) as amended by Act no. 3 of 2011* and sentenced to 30 years imprisonment. The appeal is against such conviction and sentence on the following grounds:

1. *That*, learned Trial Magistrate grossly erred by holding to unreliable visual identification of PW3 and PW5 against all appellant at the scene where no advanced detailed description was given by the victims.

2. *That,* the learned Trial Magistrate erred by holding to un-procedural identification parade conducted by PW10 against all appellants where rules and regulations of the PGO No. 232 were contravened as amplified by PW3.
3. *That,* the learned Trial Magistrate grossly erred by holding to discernable contradiction between PW3 and PW5 as to the source of light that alleged facilitated their visual identification.
4. *That,* the learned Trial Magistrate erred by convicting all appellants on basis of un-justified corroborated prosecution evidence.
5. *That,* the learned Trial Magistrate grossly erred by failing to appraise objectively the credibility of the prosecution evidence before relying on it as basis for conviction.
6. *That,* the learned Trial Magistrate erred by holding that the prosecution proved the case against all appellants beyond reasonable doubt as charged.

WHEREFORE, the appellants prayed this appeal be allowed by quashing and setting aside the conviction and sentence and acquit the appellants.

The appellants are lay persons who pursued their appeal in person. They simply called upon the court to consider the grounds of appeal and grant the prayed relief (s).

The respondent was represented by Senior State Attorney Credo Rugaju. In his reply submission, the respondent objected this appeal. The first ground of appeal calls upon this court to assess on whether the appellants were properly identified by PW3 and PW5 at the *scene*.

Upon going through the entire records, I noted, as properly replied by Senior State Attorney Mr. Credo Rugaju, the appellants were visually identified due to the following reasons of description.

First, PW3 stated how the event took place at page 20-21 of the typed proceedings, PW3 stated:

".....09/07/2013 at midnight we were invaded by thugs. We were frightened by a blow (mlipuko)....in my house there was energy server lights. I opened the cupboard and gave them 700,000/= one of them slapped me with the back of the bush knife telling me that this is not enough...."

PW3 went further to identify four accused in the court. It is clear from this point, the witness (PW3) was aided by energy server light to identify the accused. Further, when the accused were given

7,000,000/= they claimed not enough. This proves that the energy server light did not only aid the witness to identify the accused but also aided the accused to count the money before claiming to be not enough.

Second, PW5 at page 46 47 told the court how he identified the accused he stated:

".....I saw many guys, they had tied up the watch man and house girl. They had red t-shirt with black trousers all of them...on 17/07/2013 I reported at Police Oysterbay....I was taken to the back yard of the police where I found so many people lining. I was required to identify any of the suspects. Identify any of the suspects. The line had between 15-20 people. They were of the same size, heights. At police I identified 1st, 2nd 3^d and 4th accused."

Third, PW10 told the court on how he conducted the identification parade. At page 136 of the typed proceedings, PW10 told the court that he asked the accused to choose where to stand and to change clothes. PW5 stated, it is him who put on the light at corridor. The light was from two-meter tube.

PW3 at page 22 identified Ally Hashim and Kulwa Adamson. The first had blue eye "Chongo"

Fourth, at page 46 of the typed proceedings, it is evident that PW5 stayed with the accused for almost half an hour while un-covered.

It is the court position of law that witness relying on some light as an aid of visual identification must describe the source and intensity of such light. (See *Omar Idd Mbezi and others v. R.* Criminal Appeal No. 227 of 2009 CAT at Dar es Salaam (unreported).

In this case, PW3 and PW5 properly identified the appellants herein as exemplified herein above.

To analyze the second ground of appeal, the appellants alleges that the identification parade was conducted without adhering to the rules and regulations of PGO No. 232. I think the appellants were referring to PGO 132. However, PGO 132 is very clear in its wording. Identification parade register contains the following:

- a) Name of the suspect.*
- b) Name and number of the people participating in the parade.*
- c) Name of the witness.*
- d) Name and rank of the conduction officer.*
- e) Force number, rank and name of police officer in charge of the witness before and after the parade.*
- f) Any objection raised by the suspect before, during or after the parade.*

g) If the suspect was identified or not the position of the suspect during the parade.

h) Any other remarks by the officer conducting the parade concerning the parade.

i) Signature of conducting officer.

Going through the proceedings from page 139, I noted the 2nd and 3rd accused persons objected the tendering of the identification parade register but their objection was dismissed for lack of merits. It was found that PF. No. 186 was a government standard form.

I have taken trouble to go through the evidence of PW10 and exhibit P4 collectively and see whether there were rules or regulations violated. I noted the procedure of conducting the identification parade was properly complied with. The stamp was not necessary. Exhibit P4 bears signature.

On the third ground of appeal, I find nothing in record that proves there was contradiction of evidence between PW3 and PW5. As found when analyzing the first ground of appeal, the evidence of PW3 was corroborated with the evidence of PW5 as far as the issue of identifying the appellants is concerned.

The 4th, 5th and 6th grounds of appeal are in essence requiring the court to assess whether the Trial Court objectively analyzed the

evidence before reaching to the verdict that the prosecution case proved its case beyond reasonable doubt.

I understand that it is law requirement the prosecution is required to prove its case beyond reasonable doubt. (See *Jonas Nkize v. R* (1992) TLR 213. In the instant case, as correctly found by the Trial Magistrate at page 21-22 of the impugned decision, there was sufficient light at the scene, PW3 and PW5 properly identified the accused persons. Indeed, the procedure of conducting identification by PW10 and the identification parade register complied with PGO 132.

In the event of the foregoing, the appeal is dismissed for lack of merits. The conviction and sentence imposed by the Trial Magistrate against the appellants are sustained on merits.

Order accordingly.



Y. J. MLYAMBINA
JUDGE
03/10/2019

Dated and delivered on 3rd October, 2019 in the presence of the 1st, 2nd and 4th appellants and Senior State Attorney Mr. Credo Rugaju for the respondent. Right of appeal explained.



Y. J. MLYAMBINA
JUDGE
03/10/2019

A handwritten signature in black ink, written over the typed name and date.